



March 14, 2001

Mr. Don Bradley  
Deputy General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR2001-1005

Dear Mr. Bradley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144933.

The Texas Department of Health (the "department") received a request for copies of the personnel files of eleven named employees. You have submitted for our review a representative sample of the information the department seeks to withhold, and you indicate the remaining information has been or will be released to the requestor. You assert that the information the department seeks to withhold is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

Some of the information at issue consists of medical records or contains information from medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole that the department seeks to withhold. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The information we have marked as subject to the MPA must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The information at issue may be released only in accordance with the MPA, and otherwise must be withheld. Open Records Decision No. 598 (1991).

Certain information contained in the submitted samples is confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information that the department must withhold under section 552.101 in conjunction with the ADA.

The submitted documents include W-4 forms. W-4 forms are confidential under federal law. 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Attorney General Op. MW-372 (1981). The department must withhold the W-4 forms in their entirety.

You assert that the college or university transcripts responsive to the request must be withheld under section 552.101 in conjunction with 20 U.S.C. § 1232g(b)(4)(B), a provision

of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). You state that the information at issue was submitted to the department either by the applicant or employee, or by the college or university at the applicant or employee's request. In order for an educational agency or institution to be authorized under FERPA to provide the department with educational records made confidential by FERPA, the educational agency or institution must be provided with a written consent specifying the records to be released, the reasons for such release, and to whom the records may be released. 20 U.S.C. § 1232g(b)(2)(A). You have not submitted any such written consent in connection with the submitted sample of education records. The provision you cite, section 1232g(b)(4)(B), states in pertinent part that educational records made confidential by FERPA "shall only be transferred [by the educational agency or institution] to a third party [e.g., the department] on the condition that such [third] party will not permit any other party to have access to such information" without proper written consent. We advise that this provision applies only to records that were obtained by the department from an educational agency or institution pursuant to a written consent provided to the educational agency or institution under section 1232g(b)(2)(A). Further, section 1232g(b)(4)(B) only makes the records confidential in the hands of the department if the written consent which provided for release of the records to the department also did not provide for release of the records to any other third party. As we were not provided copies of any written consent, we are unable to determine whether any of the responsive educational records are confidential under section 552.101 in conjunction with 20 U.S.C. § 1232g(b)(4)(B). We do advise, however, that any of the records at issue that were submitted to the department by the applicant or employee are not made confidential by 20 U.S.C. § 1232g(b)(4)(B). Such records therefore may not be withheld pursuant to section 552.101. In the event the submitted sample was submitted to the department by the applicant or employee, it may not be withheld in its entirety. In that event, we have marked the information in the sample that is or may be subject to redaction as otherwise discussed herein.

The submitted samples contain social security numbers. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You represent that the social security number information at issue was obtained and is maintained by the department pursuant to section 441.182(c)(4) and (5) of the Government Code. These provisions pertain to the duties of the state records administrator designated by the director and librarian of the Texas State Library and Archives Commission to administer the department's state records management program. *See* Gov't Code §§ 441.180(12), 441.182(b), (c). These provisions state in pertinent part that the administrator shall "maintain in a safe and secure manner all state records in the physical custody of the [state records management] program" and "preserve the confidentiality of all confidential state records in the physical custody of the [state records management]

program.” Neither provision, however, authorizes the department to obtain or maintain an individual’s social security number or related record. Thus, the information at issue is not made confidential under section 405(c)(2)(C)(viii)(I) as information obtained or maintained pursuant to section 441.182(c)(4) or (5). We accordingly have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision.<sup>2</sup> We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has also found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information pertaining to voluntary financial decisions and financial transactions that do not involve public funds, *see* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked the information in the submitted samples that the department must withhold under section 552.101 in conjunction with the common law right to privacy.

Section 552.117(1) of the Government Code may be applicable to some of the responsive information. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. You have not submitted for our review any section 552.024 election made by any of the employees or officials whose personnel file information was requested. We advise that whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold

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<sup>2</sup>Social security numbers of current or former department employees and officials may nevertheless be confidential under section 552.117(1) of the Government Code, as discussed below.

information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 for the specific information at issue prior to the date on which the request for this information was made. For each employee or official who timely elected to keep confidential a category of personal information covered by section 552.117, the department must withhold, as applicable, the employee or official's home address and telephone number, social security number, and/or information that reveals whether the employee or official has family members. The department may not withhold this information under section 552.117 for any employee or official who did not make a timely election to keep confidential the information at issue. We have marked the submitted samples to indicate the extent to which the information may be subject to withholding under section 552.117(1).

Finally, section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to: .

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold copies of Texas driver's licenses, license numbers, and license plate numbers pursuant to this provision. We have marked the submitted samples accordingly.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

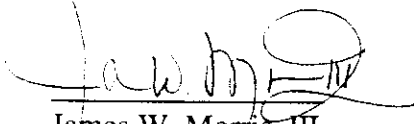
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/MG/seg

Ref: ID# 144933

Encl. Submitted documents

cc: Ms. Gaiutra Bahadur  
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(w/o enclosures)